UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

Pomptonian Food Service **Employer-Petitioner** **and** **Local 32BJ, SEIU** **Union**	**Case No. 22-RM-755**

PETITIONER POMPTONIAN FOOD SERVICE'S REQUEST FOR REVIEW OF THE REGIONAL DIRECTOR'S ORDER ON REMAND AND DISMISSAL OF PETITION

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I. INTRODUCTION

Petitioner Pomptonian Food Service ("Pomptonian" or the "Employer"), by its attorneys Epstein, Becker & Green, P.C., submits this Request for Review of the Regional Director's Order on Remand and Dismissal of RM Petition, dated October 11, 2011 (the "Order"),[1] pursuant to Section 102.67 of the Board's Rules and Regulations. This Request for Review is based on the following grounds:

(1) The Order raises substantial questions of law and policy because of (i) the absence of, and (ii) a departure from, officially reported Board precedent and procedure.

(2) The Order is clearly erroneous on the record on substantial issues of undisputed fact and such errors prejudicially affect the rights of Pomptonian and employees of Pomptonian.

The fundamental issue in this case is whether the Regional Director, acting at the direction of the National Labor Relations Board (the "Board") can be ordered to disregard and act in direct contradiction to an express representation that he made to Pomptonian, and that Pomptonian relied upon in entering into a non-admission settlement agreement, that the Petition would be processed after Pomptonian carried out the terms of a pre-complaint, non-admissions settlement agreement in Case No. 22-CA-29046. Although the Regional Director acknowledged that he made this representation, and does not dispute that Pomptonian entered into the Settlement Agreement in that case in reliance upon that representation, he finds in the Order that Pomptonian is not prejudiced or harmed by his breach of that representation. He is incorrect.

[1] A copy of the Regional Director's Order is attached as Exhibit A.

Additional issues presented are whether Pomptonian possessed good-faith reasonable uncertainty as to the Union's majority status at the times that it prospectively withdrew recognition from Local 32BJ SEIU (the "Union") as the bargaining representative of a unit of its employees employed in the South Orange Maplewood School District (the "District") and at the time that it filed the RM Petition in Case No. 22-RM-755 (the "Petition"). Moreover, and perhaps most importantly, review should be granted to address the fact that because Pomptonian relied upon the Regional Director's representation, at the time it agreed to enter into a non-admission based Settlement Agreement in Case No. 22-CA-29046, that at such time as Pomptonian fulfilled its obligations under that Settlement Agreement, that the Regional Director would process the Petition and conduct an election, the Board should review and consider Pomptonian's argument that the Regional Director and the Board should be equitably estopped from dismissing that Petition given that it is not disputed that Pomptonian detrimentally relied on those representations in entering into the Settlement Agreement. As demonstrated through the evidence on record, the Regional Director's Order is clearly unsupported by the evidence, a departure from Board precedent and procedures, and prejudicially affects the rights of Pomptonian and its employees. Accordingly the Board should grant Pomptonian's Request for Review and direct the Regional Director to process the Petition without further delay.

II. PRELIMINARY STATEMENT

Contrary to the Regional Director's Order, the record overwhelmingly established that the Petition should not be dismissed, but rather that it should be processed and an election directed so that the employees in the Unit may resolve the uncertainty as to whether they wish to contain to be represented by the Union in a Board-conducted secret ballot election. At the time Pomptonian filed the Petition, on October 30, 2009, it possessed the requisite good-faith

reasonable uncertainty as to the Union's continued majority status in the in the Unit. That doubt was based on both the untainted, organic petitions that the unit employees presented to Pomptonian in April 2009, unequivocally stating that they no longer wished to be represented by the Union, and the fact that even after the Union sought to rebut those petitions by providing Pomptonian with undated cards bearing employees' signatures indicating that a substantial number of employees once again wanted the Union to represent them, a reasonable good faith doubt still existed after the Union presented Pomptonian with the undated counter petitions that it cited in support of its contention that the unit employees wanted it to represent them.

When the Regional Director then investigated the Union's unfair labor practice charges, he found that the Union's contention that Pomptonian was behind the employees' petitions asking Pomptonian to withdraw recognition was not supported by the evidence. He also found that nothing that Pomptonian had done had in any way contributed to the Union's loss of majority support and that Pomptonian had neither supported nor assisted the employees' April 2009 petitions.

With respect to the alleged unfair labor practices that were the subject of the non-admission Settlement Agreement in Case No. 22-CA-29046, it is clear that the alleged violations were fully remedied and would not interfere with an election at this time. Indeed, this was the Regional Director's own original finding. Pursuant to the Settlement Agreement, Pomptonian restored recognition to the Union and negotiated and executed a new collective bargaining agreement with the Union. Accordingly, any potential or alleged "taint" that might arguably have served as the basis for dismissal for the Petition was wholly cured, and the Petition should have been processed in accordance with the Region's pre-settlement representations to Pomptonian.

The Regional Director's Order dismissing the Petition is also flawed on procedural and legal grounds, in that the dismissal of the Petition was in contradiction to the terms of and intent of the Board's own established procedures, which call for the processing of a Petition after the execution and carrying out of the terms of a settlement agreement has cured any possible harm, where the petition has not been withdrawn, and the settlement agreement contains a non-admissions clause, each of which conditions is present here. Additionally, the Regional Director expressly represented to Pomptonian that if it entered into the Settlement Agreement and carried out its terms, the Petition would be processed. Pomptonian relied on those representations to its detriment, and entered into the Settlement Agreement.

Finally, the Board, in remanding this matter to the Regional Director with direction that he ignore the representations that he made to Pomptonian before it agreed to enter into the Settlement Agreement, has also denied Pomptonian due process and fundamental fairness, by essentially ordering the Regional Director to reverse his initial denial of the Union's motion to dismiss the Petition and ordering him to disregard the commitments he admittedly made to Pomptonian. By granting Pomptonian's request for review, the Board has the opportunity right these wrongs. The Board can only do so by directing the Regional Director to process the Petition consistent with the representations which he made and Pomptonian relied upon.

III. FACTUAL BACKGROUND

A. The Employees' Petitions

The Unit employees are employed by Pomptonian in connection with its contract to provide school meal services in the South Orange Maplewood School District. Unit employees, who are employed on either a full-time or part-time basis, are generally employed

from the start of the school year at the beginning of September through the conclusion of the school year in June, with employees laid off on a staggered basis at the end of the school year.

Pomptonian voluntarily recognized the Union in 2007, shortly after it began operations in the District. Recognition was based upon the fact that Pomptonian had hired a majority of the employees who had previously been employed by Sodexo, the District's previous vendor.[2] Pomptonian and the Union entered into an initial collective bargaining agreement (the "CBA") for the term September 1, 2007 through August 31, 2009, the expiration date of the Union's contract with Sodexo. The CBA largely tracked the terms of the unexpired contract between Sodexo and the Union.

In late April 2009, employees presented Pomptonian with petitions that had been signed and dated by more than 50% of the employees in the Unit. Those petitions, copies of which Pomptonian provided to Region 22, constituted clear and unambiguous evidence of the fact that the unit employees no longer wished to be represented by the Union. Once Pomptonian confirmed that the signatures on the petitions were authentic, and in reliance upon such objective evidence and the Board's decision in *Levitz Furniture Co.*, 333 NLRB 717 (2001), Pomptonian notified the Union by letter dated May 11, 2009, that inasmuch as it had determined on the basis of objective evidence that a majority of the employees in the Unit no longer supported or wished to be represented by the Union, Pomptonian was prospectively withdrawing recognition from the Union, with such withdrawal to be effective upon the expiration of the CBA, August 31, 2009. There is no dispute that Pomptonian continued to fully comply with all of the terms of the CBA for the remainder of its term.

[2] The contract between Sodexo and the Union contract contained a union security clause.

B. The Union's Counter-Petitions

The Union subsequently mailed Pomptonian a number of counter-petitions (the "Counter-Petitions"), and advised Pomptonian that the employees who had signed them had changed their minds and that a majority of the Unit employees once again wished to be represented by the Union. Neither the Counter-Petitions nor any of the signatures on them were dated. Based on those undated signatures, the Union demanded that Pomptonian restore recognition. At no time did the Union ever offer any evidence as to when the Counter-Petitions were actually signed.

A number of the employees whose signatures were on the Counter-Petitions had also signed the dated petitions that the Unit employees had previously presented to Pomptonian. During its investigation of the Charges that the Union subsequently filed, Region 22 concluded that more than 30% of the Unit employees signed only the petitions asking Pomptonian to withdraw recognition. Thus, it is clear under *Levitz* that not only at the time that Pomptonian received the undated Counter-Petitions from the Union but that at least through the expiration of the CBA, Pomptonian could have filed an RM petition based upon the good-faith uncertainty that existed as to the Union's continued majority status created by the conflicting petitions, and that the Region would have processed an RM petition at that time.

Moreover, during the period that the Union was apparently collecting signatures for the Counter-Petitions, a number of Unit employees voluntarily and freely came forward and told Pomptonian that (a) representatives of the Union and co-workers had threatened them that they would lose their jobs if they did not sign the Union's Counter-Petitions and (b) the only reason they had signed a Counter-Petition was fear of the Union's threats. Pomptonian provided the Region with detailed information as to the specifics of these reports.

Based on all of the facts and circumstances, including its good faith doubt as to the Union's claim that it was supported by an uncoerced majority of the Unit employees, Pomptonian wrote to the Union that it would not restore recognition at that time. Pomptonian also proposed to the Union that if it truly believed that a majority of the Unit employees wished to be represented, it should file a representation petition with the NLRB, so that the employees could decide in a Board-conducted election. There is no question that if the Union had filed a petition at that time that the Board would have processed it.

C. The Unfair Labor Practice Charges

Instead, on or about June 24 and August 6, 2009, the Union filed Charge Nos. 22-CA-28977 and 29046. Both of these charges were filed by the Union prior to the expiration of the CBA and before the effective date of Pomptonian's prospective withdrawal of recognition. In these charges the Union alleged that Pomptonian had violated Sections 8(a)(1) and (5) of the Act by "unlawfully promoting decertification," "prohibiting pro-union employees from even discussing the Union," and refusing to bargain with the Union for a new agreement to succeed the parties' CBA, which was due to expire on August 31, 2009. Pomptonian denied these allegations and presented evidence that it had neither supported or assisted the petitions seeking withdrawal of recognition, nor prohibited any employees from discussing the Union. It also presented evidence that it had prospectively withdrawn recognition from the Union based upon objective evidence that a majority of the employees in the Unit had presented it with clear and unambiguous evidence demonstrating that they no longer wished to be represented for bargaining by the Union. Pomptonian also informed the NLRB that it was not legally obligated to restore recognition to the Union under these circumstances because of the fact, *inter alia*, the signatures on the Counter-Petitions were obtained by the Union through coercion and threats.

D. The RM Petition

While the Charges remained under investigation, and based in part upon the suggestion of the Region, on October 30, 2009, Pomptonian filed the RM Petition in Case No. 22-RM-755. In support of the Petition, Pomptonian relied upon the petitions signed by a majority of Unit employees unequivocally stating that they no longer wanted to be represented by the Union for the purposes of collective bargaining. As Pomptonian advised the Region at that time, Pomptonian filed the Petition with the objective of allowing for a resolution of the question of whether or not its employees in the District wanted to be represented by the Union. In fact, Region 22 encouraged Pomptonian to file the Petition.

At the time that this Petition was filed, the Region was still actively investigating Pomptonian's Charge Nos. 22-CA-28977 and 29046, and those Charges initially blocked the processing of the Petition. The Region's investigation included the allegation that employees in the Unit had come forward to managers and informed them that they had been threatened with loss of their employment if they did not sign the Union's Counter-Petitions. Pomptonian supervisors and employees in the Unit who were subpoenaed by Region 22 provided sworn statements describing threats that they had received, and/or been told of by others who had been threatened, to coerce them to sign the Union's Counter-Petitions.

E. The Settlement Agreement

Upon the conclusion of its investigation, Region 22 informed Pomptonian that it had found the Union's claims that Pomptonian had promoted and/or assisted the circulation of the petitions against further representation were not supported by the evidence and that Charge No. 22-CA-28977 would be dismissed if the Union did not withdraw it. The Region also informed Pomptonian that it was prepared to issue a complaint with respect to Pomptonian's

withdrawal of recognition of the Union and its refusal to bargain following the expiration of the 2007-2009 CBA.

Pomptonian and the Region engaged in settlement discussions with respect to the 8(a)(1) and (5) allegation in Case No. 22-CA-29046. One of the issues that Pomptonian raised in those discussions was what impact the decision to issue a complaint, absent settlement, and an agreement by Pomptonian to enter into a settlement agreement prior to the issuance of a complaint, would have on the pending Petition in Case No. 22-RM-755. Region 22 informed Pomptonian that if Pomptonian agreed to settle the allegations, the Region would continue to hold the Petition in abeyance and would process the Petition after the terms of the settlement were carried out. In reliance on that representation, Pomptonian informed the Region that it would be willing to enter into a pre-complaint Settlement Agreement containing a non-admissions clause, which would provide for a restoration of recognition bargaining with the Union for a new contract upon request and the posting of a Notice. On March 9, 2010, the Regional Director approved such a Settlement Agreement, a copy of which is attached as Exhibit B.[3] The Union did not object and was in fact a party to the Settlement Agreement.

Pomptonian confirmed at the time that it agreed to enter into the Settlement Agreement that it was doing so in "reliance upon the fact that the National Labor Relations Board shall continue to hold in abeyance the Petition filed by Pomptonian in Case No. 22-RM-755, and that upon the conclusion of the Notice posting provided for in the Agreement said Petition shall be processed by the Board." *See* Steven M. Swirsky's letter dated March 5, 2010, attached as Exhibit C. The understanding and agreement that the Petition would be processed

[3] The Non-Admissions Clause in the Settlement Agreement provides that "By executing this settlement agreement [Pomptonian] does not admit that it has violated the National Labor Relations Act, as amended."

after the compliance period was a key element of Pomptonian's agreement to settle the unfair labor practice charges filed by the Union.

While the Board stated in its Order Remanding, dated March 24, 2011, that the Union was not aware that the RM Petition was being held in abeyance by Region 22 for future processing, neither the Board nor Region 22 afforded Pomptonian an opportunity prior to that date to respond to that contention, which the Board deemed relevant in issuing its Order Remanding. In fact, there was no question that throughout the time that Pomptonian and the Union engaged in negotiations for a new collective bargaining agreement following the Settlement Agreement, the Union was aware that Region 22 was holding the Petition in abeyance and was going to process it after the terms of the Settlement Agreement were carried out. It was for this reason that the Union's negotiators regularly and repeatedly made reference to the pending Petition at the bargaining table and in side discussions with Pomptonian's negotiators, telling them that the Union was prepared to make concessions in bargaining provided Pomptonian withdraw the Petition. Indeed, the Union confirmed this in writing. *See, e.g.*, E-Mails between Manny Pastreich of the Union and Howard Grinberg of Pomptonian, dated July 1, July 2, September 22, and September 29, 2010, collectively attached as Exhibit D. The Regional Director also notified the Union that he would process the Petition upon Pomptonian's compliance with the Settlement Agreement.

Pursuant to the terms of the Settlement Agreement, Pomptonian posted the Board's Notice. Additionally, upon the Union's request, Pomptonian met with the Union and negotiated a new collective bargaining agreement covering the employees in the Unit. On November 5, 2010, Acting Regional Director Julie Kaufman issued a closing letter acknowledging that Pomptonian "has met its obligations with regard to all terms and provisions

of the Settlement Agreement." A copy of the Region's November 5, 2010 closing letter is attached as Exhibit E.

F. Procedural History Regarding the Petition

While it was Pomptonian's expectation that the Regional Director would then resume processing the Petition, he did not. Instead, on December 1, 2010, the Regional Director issued a Notice to Show Cause (the "Notice"), which stated that it had been issued in response to an *ex parte* letter dated October 15, 2010 from the Union requesting dismissal of the Petition. The Notice stated that the Regional Director "...consider[ed] the [Union's October 15, 2010] letter as a Motion to Dismiss the Petition...." The Notice solicited the parties' legal positions as to whether the Region should continue to process the Petition filed by Pomptonian. A copy of the Notice is attached as Exhibit F.

On December 20, 2010, Pomptonian submitted its Response to the Notice, opposing the Union's "motion" on substantive grounds, based on the Board's decisions in *Levitz* and *Truserv Corporation*, 349 NLRB 227 (2007), and the facts as set forth above, as well as on procedural grounds including, *inter alia*, the fact that the Union had not served its "motion" on Pomptonian and, therefore, failed to comply with Section 102.65 of the Board's Rules and Regulations. A copy of Pomptonian's Response is attached as Exhibit G.

By Order dated January 13, 2011, the Regional Director denied the Union's motion to dismiss the Petition. The Regional Director applied Board law established under *Levitz* and *Truserv Corporation* and held: (1) the Petition was not "tainted;" (2) the Settlement Agreement executed by the parties and approved by the Regional Director contained an express "non-admissions" clause and did not provide a basis to dismiss the Petition; (3) Pomptonian had

established the requisite "good-faith uncertainty" to justify the filing of an RM Petition; and (4) the unfair labor practice allegations by the Union against Pomptonian had been fully remedied. The Regional Director ordered that the Union's motion be denied and the processing of the Petition be resumed.[4] A copy of the Regional Director's January 13, 2011 Order is attached as Exhibit H.

Thereafter, the Union requested review of the Regional Director's Order denying the Union's request that he dismiss the Petition. Pomptonian opposed that request for the above-stated reasons. On March 24, 2011, the Board issued an Order Remanding this case to the Regional Director, requesting that the Regional Director and Union address what it referred to as "representations" in Pomptonian's opposition to the Union's motion to dismiss the Petition, including the fact that the Regional Director had represented to Pomptonian during the negotiation of the Settlement Agreement that if Pomptonian entered into such a Settlement Agreement, the Regional Director would not dismiss the Petition, but would hold it in abeyance for processing after the terms of the Settlement Agreement had been carried out *and* Pomptonian had relied upon those representations in entering into the Settlement Agreement. A copy of the Board's March 24, 2011 Order Remanding is attached as Exhibit I.

On May 2, 2011, the Regional Director issued a Supplemental Order on Remand, addressing the Board's Order, confirming that he had indeed represented to Pomptonian that if it entered into the Settlement Agreement and complied with its terms, he would process the Petition. A copy of the Regional Director's May 2, 2011 Supplemental Order on Remand is

[4] The Regional Director's January 13, 2011 Order did not address certain procedural issues raised by Pomptonian in its response to the Notice to Show Cause. Pomptonian submits that not only was the Regional Director's denial of the Union's request that he dismiss the Petition substantively correct, in fact the request for dismissal and the issuance of the Notice to Show Cause were, in fact, procedurally flawed, and the Union's request should have been denied for that reason as well.

attached as Exhibit J. On August 24, 2011, the Board issued a second Order Remanding, asking the Regional Director to consider the following two questions: (1) whether Pomptonian possessed the requisite good-faith reasonable uncertainty on October 30, 2009, when it filed the Petition, and (2) whether *Levitz* or other Board precedent required any other form of good faith at the time it filed the Petition and, if so, whether the requisite good faith was absent based on Pomptonian's earlier withdrawal of recognition. A copy of the Board's August 24, 2011 Second Order on Remand is attached as Exhibit K.

On October 11, 2011, the Regional Director issued the instant Order, dismissing Pomptonian's Petition. In the Order, the Regional Director acknowledged that Pomptonian "was told by the Region that the RM Petition would be held in abeyance and would be processed following compliance with a settlement agreement," but stated that this was an incorrect statement of the proper procedure to be followed in this case. The Regional Director did not cite the procedural standards that he believed should have been followed, nor did he cite any authority, either in Board decisions, the Board's Case Handling Manuals, or otherwise of his action. Additionally, the Regional Director stated, "Since it is [Pomptonian's] alleged unfair labor practices which preclude the processing of its RM petition, I find that it is not inequitable to [Pomptonian] to dismiss the petition under these circumstances."

Pomptonian has never been found by the Board to have committed any unfair labor practices, and the Settlement Agreement, which Pomptonian entered into in reliance on the Regional Director's assurances that its Petition would be processed, contained an explicit non-admissions clause. Additionally, the employees in the Unit will be prejudiced in that they are denied the right to a Board election to resolve the question of whether they wish to continue to be represented.

IV. ARGUMENT

The record overwhelmingly demonstrated that Pomptonian had the requisite good-faith reasonable uncertainty necessary to file its Petition when it relied upon employees' untainted and unsolicited petitions stating that they no longer wished to be represented by the Union, proceeded in good faith throughout the negotiation of the Settlement Agreement with the Region and in bargaining with the Union after the Union filed unfair labor practice charges against it, and cured any possible effect of the alleged unfair labor practices that were the subject of the Settlement Agreement. The Regional Director's Order dismissing the Petition is flawed on procedural and legal grounds, and it is wrong in its conclusion that it would not be inequitable to dismiss the Petition even though Pomptonian relied, to its detriment, upon his representations and assurances that the Petition would be processed when it agreed to enter into the non-admission Settlement Agreement and gave up its right to litigate the underlying allegations. Finally, the Regional Director failed to consider public policy concerns that mandate the dismissal of the Union's "motion" to dismiss the Petition, the processing of Pomptonian's Petition, and the holding of an election so that Pomptonian's employees can exercise their right under the Act to determine whether they wish to continue to be represented by the Union. Based upon all of the above, the Regional Director should be barred by the doctrine of estoppel from acting in a manner in direct contradiction to his representations that Pomptonian relied upon in entering into the Settlement Agreement.

A. The Regional Director Previously Correctly Determined in His January 13, 2011 Order that Pomptonian Had the Requisite Good-Faith Reasonable Uncertainty to File the RM Petition, and the RM Petition Should Be Processed

In his Order dated January 13, 2011, Exhibit H, the Regional Director correctly determined that Pomptonian had a good-faith reasonable uncertainty as to the Union's continued majority status under *Levitz Furniture Co.*, 333 NLRB 717 (2001) and that this supported the filing and processing of the Petition. Specifically, this good-faith reasonable uncertainty was supported by the organic and untainted petitions signed by a majority of Pomptonian's employees, clearly stating that they no longer wished to be represented by the Union, together with its employees' unsolicited subsequent statements to Pomptonian that the Union obtained employees' signatures on Counter-Petitions through threats and coercion.

While the Union, citing *Lee Lumber & Building Materials Corp.*, 322 NLRB 175 (1977), *HQM of Bayside*, 348 NLRB 758 (2006), and *Celanese Corporation*, 95 NLRB 664 (1951),[5] argued that Pomptonian could not rely upon its "good-faith uncertainty" to support the Petition, because Pomptonian withdrew recognition before it filed the Petition, thereby tainting the Petition, this argument was plainly wrong for several reasons. First, Pomptonian received the employees' petitions unequivocally stating that they no longer wished to be represented by the Union before Pomptonian prospectively withdrew recognition from the Union, and these

[5] The Board explicitly stated in *Levitz* that its holding overruled *Celanese Corporation*. In any event, if the Regional Director relied upon *Celanese Corporation* in issuing the instant Order, then the standards are even lower than those enumerated in *Levitz*, as *Celanese Corporation* required only an employer's good faith belief that that a union no longer enjoyed a majority status prior to refuse to bargain or withdraw recognition from the union. *Celanese Corp.* 95 NLRB 664, 673 (1951). *See also Glendale Carriers Corp.*, 2001 NLRB LEXIS 526, at *21-23 (2001) (an employer was required to show only reasonable uncertainty as to the union's majority status before withdrawing recognition from a union, under the *Celanese Corporation* standard as interpreted by the Supreme Court in *Allentown Mack Sales & Service v. NLRB*, 522 U.S. 359 (1998)).

petitions formed the basis for Pomptonian's prospective withdrawal of recognition.[6] These petitions also established a good-faith reasonable uncertainty and a question concerning representation that supported the filing of the Petition, as Region 22 urged, even after the Union submitted its Counter-Petitions. Therefore, the withdrawal of recognition at the expiration of the contract, after the Union had presented its undated Counter-Petitions, had no bearing on the unsolicited and organic petitions submitted by the employees and, therefore, did not taint Pomptonian's good-faith reasonable uncertainty.

Second, the Order is inconsistent with the fact that the Region had thoroughly investigated the Union's assertion in Case No. 22-CA-28977, that unlawful "taint" with respect to the initial petitions that Pomptonian relied upon and found the Union's allegations to be unsupported by the evidence. Indeed, the Regional Director told the parties that this was the reason that he would not issue a complaint on the Union's allegations in Charge No. 22-CA-28977, in which the Union has alleged that Pomptonian had unlawfully supported or assisted the petitions in which the majority had stated they no longer wanted the Union to represent them.

Furthermore, the Regional Director previously correctly found that the Union's Counter-Petitions did not destroy Pomptonian's good-faith uncertainty, which supported its filing of the Petition. To the contrary, the Union's Counter-Petitions actually further demonstrated by their contrast with the earlier employee petitions, a conflict which, under *Levitz*, satisfies the good-faith uncertainty test concerning the Union's continued majority status. As the Board held in *Levitz*:

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[6] Under *Levitz*, these petitions alone would have constituted "objective evidence" establishing "actual loss" of majority support sufficient to lawfully withdraw recognition from an incumbent union. *Levitz*, 333 NLRB at 725; *Renal Care of Buffalo, Inc.*, 347 NLRB 1284, 1286 (2006).

> Another reason for adopting the "uncertainty" standard is that sometimes, as in this case, employers are presented with conflicting evidence concerning employees' support for unions. *The Respondent was given a petition, apparently signed by a majority of the unit employees, stating that they no longer wanted to be represented by the Union. Two weeks later, the Union proffered evidence which, it claimed, showed majority support.* It would be difficult to contend that the Respondent, faced with such conflicting evidence, believed in good faith that the Union had lost its majority status. But *it would be just as hard to argue that the Respondent could not, under those circumstances, harbor uncertainty regarding the Union's majority status. We think it is justifiable for an employer in those circumstances to seek an RM election to resolve that uncertainty, yet under the good-faith belief standard, it would be unable to do so. Under the standard we adopt today, employers who are faced with such contradictory evidence will be able to obtain elections.*

333 NLRB at 727 (emphasis added). It is undisputed that when Pomptonian filed the Petition in October 2009, it did so with the guidance of the Region because the Region, at that time, saw an RM Petition as an appropriate means for resolving the uncertainty as to the support for the Union. Similarly, it was the Regional Director's assurance that if it entered into the Settlement Agreement the Board would process the Petition after it carried out its obligations under the Settlement Agreement.

In Memorandum GC 02-01, Guideline Memorandum Concerning *Levitz*, (2001), the Board's General Counsel acknowledged that certain evidence previously deemed unreliable under the good-faith doubt or disbelief standard would be acceptable when evaluating an employer's uncertainty under *Levitz*, including employees' anti-union sentiments and statements expressing dissatisfaction with the union as their bargaining representative. *Id.* at 3. Clearly, the employees' signed dated petitions to Pomptonian stated that they no longer wished to have the Union represent them, together with the statements made to Pomptonian by its employees regarding the Union's coercive conduct and threats to get them to sign the Counter-Petitions,

constitute such acceptable evidence and should, therefore, also be considered when evaluating Pomptonian's good-faith uncertainty at the time the Petition was filed.

Moreover, Pomptonian made witnesses available to the Region in Charge No. 22-CA-28977. These witnesses corroborated the evidence that Pomptonian had at the time the Petition was filed, providing affidavits that supported Pomptonian's reasonable belief that the Union obtained at least some employee signatures on its Counter-Petitions by fraud, coercion, and other improper means and, therefore, the initial petitions provided by the employees to Pomptonian were still valid evidence to create uncertainty. Accordingly, the Regional Director was correct when he found initially that a question concerning representation existed and argued the same when he urged the Board to deny the Union's Request for Review.

However, in light of the Union's Counter-Petitions, the Regional Director notified Pomptonian that he was prepared to issue a complaint with regard to its withdrawal of recognition, pursuant to the charges in 22-CA-29076. Accordingly, Pomptonian ultimately agreed, in reliance upon the Region's representations that the Petition would not be dismissed, but would be held in abeyance and processed after the terms of the Settlement Agreement were carried out, entered into the Settlement Agreement.[7]

The fact that the evidence at the time Pomptonian filed the Petition may not have been sufficient to demonstrate "actual loss" of majority does not mean that there was not a good-faith reasonable uncertainty regarding the Union's majority status sufficient to support the filing

[7] In his January 13, 2011 Order, the Regional Director correctly applied existing Board precedent set forth in *Truserv Corporation*, 349 NLRB 227, relying on the facts that the Settlement Agreement contained a non-admissions clause, there was no finding of "taint" or any unlawful activity by Pomptonian, and the fact that the Settlement Agreement did not withdraw the Petition. Furthermore, the Settlement Agreement was entered into with the express understanding that, upon Pomptonian's compliance with the same, the Petition would be processed and an election conducted.

of a Petition. As previously stated, Pomptonian was notified by employees that at least some of the signatures on the Union's Counter-Petitions were the result of threats and coercion, employees had not voluntarily signed the Counter-Petitions, and employees no longer wished to have the Union represent them. Additionally, over 30% of the employees who signed the uncoerced and unsolicited petitions submitted to Pomptonian in April 2009 did not sign the Union's Counter-Petitions. This alone would be sufficient under *Levitz* to satisfy the good-faith reasonable uncertainty standard required to file the Petition at the time the Petition was filed.

Furthermore, even had Pomptonian's belief that it was obligated to withdraw recognition from the Union given the unsolicited petitions submitted by a majority of the employees that they no longer wished to have the Union represent them as their collective bargaining representative, been found by the Board to have been a mistaken belief, which it was not because the issue was not litigated,[8] that would not have demonstrated any bad faith on Pomptonian's part. In fact, the events both prior and subsequent to Pomptonian's prospective withdrawal of recognition clearly demonstrate that Pomptonian has, at all times, continued to proceed in good faith in relation to these matters.

In this regard, when Pomptonian began operations in the District in 2007, it voluntarily recognized the Union based upon the fact that it had hired a majority of the employees previously employed by Sodexo, the District's previous vendor. Pomptonian bargained with the Union at that time and entered into the initial CBA. After receiving notification from the Regional Director that its conduct in withdrawing recognition from the Union would be subject to the issuance of a complaint, Pomptonian entered into a pre-complaint

[8] This issue was not litigated and there was no determination of any unfair labor practice on the part of Pomptonian, as Pomptonian, in reliance upon the assurances of the Regional Director, entered into a non-admission Settlement Agreement with the Union. *See, infra*, Argument at B, C.

non-admission Settlement Agreement in reliance on the representations of the Regional Director. Thereafter, Pomptonian, in good faith, fully complied with all of the terms of the Settlement Agreement, including negotiating a new collective bargaining agreement with the Union, and, based on statements Pomptonian made during negotiations with the Union.

At the time of the filing of the Petition, and through today, Pomptonian has continued to have a good-faith reasonable uncertainty regarding the question concerning the support of the employees for the Union. Accordingly, any good-faith requirement under *Levitz* or any other Board precedent has clearly been satisfied at all times.

B. The Regional Director's Order Runs Contrary to the Board's Procedure and Precedent

The Regional Director's finding in the Order that his earlier decision to hold the Petition in abeyance for processing after compliance with the Settlement Agreement "was an incorrect statement of the proper procedure to be followed in this case" is without basis in law and is in fact contrary to the Board's own Casehandling Manual. *See Truserv Corp.*, 349 NLRB 227 (2007); National Labor Relations Board Casehandling Manual ("Casehandling Manual") §§ 11730-34 (2009). Specifically, Sections 11730-11734 of the Casehandling Manual provide guidance as to how the Board's Regional offices are to proceed with an RD or RM petition where there is an unfair labor practice charge that could potentially block the processing of the petition. Throughout these relevant sections, it is stated that a representation petition will be held in abeyance pending the investigation of or hearing on an unfair labor practice charge and thereafter may be processed. Casehandling Manual §§ 11730-34.

Here, the only allegations made by the Union that, if they had been proven, could have warranted the dismissal of the Petition, was the Union's claim that Pomptonian supported

or coerced the initial petitions submitted by the employees to Pomptonian in April 2009. However, these allegations were investigated and found to be without merit, the Regional Director notified Pomptonian that the Region found no merit to this charge, and would dismiss it absent withdrawal of the charge by the Union. It was for this reason that the Union withdrew the Charge in Case No. 22-CA-28097 in its entirety.

Even assuming that the Union's charges relating to Pomptonian's withdrawal of recognition from the Union and alleged implementation of unilateral changes, if proven, could have served as a basis for dismissal of the Petition, any impact that these actions could have had on Pomptonian's employees in an election had been wholly cured by Pomptonian's actions of subsequently entering into the Settlement Agreement, restoring recognition to the Union, and bargaining a successor collective bargaining agreement with the Union. Accordingly, there could be no finding that these alleged unfair labor practices affected or would have otherwise colored the employees' free choice in an election. *Truserv Corp.*, 349 NLRB 227.

Furthermore, the voluntary and uncoerced petitions submitted by Pomptonian's employees in April 2009 were signed and submitted to Pomptonian *before* any of the alleged unfair labor practices addressed in the Settlement Agreement were alleged to have occurred. Thus, these alleged unfair labor practices could not have had any causal relationship to the expression of employee disaffection with the Union reflected in those petitions. Where there is no evidence of causal nexus, "*e.g.*, the showing of interest was obtained prior to the alleged unlawful conduct," then the Board's own Casehandling Manual states that "[n]o further consideration should be given to dismissal of the petition." Casehandling Manual §11730.3(c).

While the Regional Director now finds that holding the Petition in abeyance for processing after compliance with the Settlement Agreement "was an incorrect statement of the proper procedure to be followed in this case," it is clear that the opposite is true. Not only was it a correct statement of the proper procedure to be followed and what he told Pomptonian would occur, but dismissal of the Petition now is the *incorrect* procedure to be followed. The Casehandling Manual clearly states that a "petition **cannot** be dismissed based upon a settlement of alleged but unproven unfair labor practices. In these circumstances, unless the petitioner withdraws the petition or the respondent admits liability as part of the settlement, the petition **should be processed.**" Casehandling Manual §§ 11733.2(a)(1)-(3) (emphasis added) (citing *Truserv Corp.*, 349 NLRB 227 (2007).[9] Here, Pomptonian entered into a settlement agreement, with an express non-admissions clause and with the understanding that the Petition would not be withdrawn. Thus, the Petition "should be processed." *Id.*

C. The Regional Director Improperly Found that It Is Not Inequitable to Pomptonian to Dismiss the Petition Where Pomptonian Relied on the Regional Director's Assurances to Its Detriment

The Regional Director's finding that "[s]ince it is the Employer's *alleged* unfair labor practices which preclude the processing of its RM petition, I find that it is not inequitable to the Employer to dismiss the petition under these circumstances," Exhibit A at 2 (emphasis added), is completely unsupported by the evidence and the Board's own procedures. Pomptonian did not commit an unfair labor practice when it prospectively withdrew recognition from the Union based upon the untainted and unsolicited petitions it received from its employees in April 2009. At all times thereafter, even after the Union presented its Counter-Petition,

[9] The Board's holding in *Truserv Corporation* is specifically cited in the Board's Casehandling Manual as the precedent to be followed with regard to the processing of an R petition after the execution of a settlement agreement. Casehandling Manual § 11733.2(a)(1)-(3).

uncertainty existed as to the Union's continued support and the Union refused Pomptonian's proposal that the Union petition for an election to resolve the uncertainty. *See Levitz*, 333 NLRB at 724. When determining whether an employer unlawfully withdrew recognition from an incumbent union, only the events and circumstances as they were at the time of the withdrawal should be considered; subsequent events occurring after an employer has withdrawn recognition from the union have no bearing on the legality of the withdrawal. *See, e.g., Calatrello v. Carriage Inn of Cadiz*, 153 Lab. Case (CCH) ¶ 10,760 (S.D.O.H. 2006) ("this Court will examine whether Petitioner's legal theory of unlawful withdrawal is supported by the principles of the NLRA according to the evidence prior to [the date of withdrawal] . . . this Court will not consider the events that occurred *after* Respondent withdrew recognition from the Union" (emphasis in original)). At the time Pomptonian prospectively withdrew recognition from the Union, it had objective evidence that the Union did not, in fact, have the support of a majority of its employees.

If the withdrawal of recognition from the Union was proper, then Pomptonian also had the right to implement the alleged unilateral changes, as it would have been illegal under Section 8(a)(2) to bargain with the Union at that point in time. 29 U.S.C. § 158. *See also Levitz*, 333 NLRB at 724 ("Under Board law, if a union actually has lost majority support, the employer must cease recognizing it, both to give effect to the employees' free choice and to avoid violating Section 8(a)(2) by continuing to recognize a minority union"); *Garment Workers v. NLRB*, 366 U.S. 731, 738-39 (1961). Accordingly, had Pomptonian not relied upon the Regional Director's representations that he would process the Petition, it would have had the opportunity to litigate these issues, and might well have been found to not have committed any unfair labor practices.

However, relying upon the representations of the Regional Director, Pomptonian gave up its opportunity to litigate these issues. Pomptonian fully explored its options regarding how best to amicably proceed with this matter, and was unequivocally told that, if it entered into the non-admission Settlement Agreement, and fulfilled its obligations under said agreement, the Petition would be processed and an election held. *See* Exhibit C.[10] In reliance on these representations, Pomptonian did enter into the Settlement Agreement, with an explicit non-admissions clause and did fulfill its obligations under the terms of the Settlement Agreement, restoring recognition and negotiating a new contract with the Union, one which the Union agreed, consistent with *Truserve*, would be of no further legal effect if, when the election was held, the majority voted against continued representation. *See* Exhibits B, E. Had Pomptonian known that the Board would renege on its assurances, it might well have undertaken the process of litigating the underlying unfair labor practice charges to completion, and likely could have been successful. However, in good faith reliance on the Regional Director's commitments, which were in accord with the Board's own published practices and procedures, *see* Casehandling Manual §§ 11730-34, Pomptonian has now been deprived of this right. Given all of these facts, under the doctrine of estoppels, the Regional Director should now be required to process the Petition as he committed he would.

The Union was aware of the pending processing of the Petition. Significantly, the Union frequently referred to the Petition during negotiations with Pomptonian for a successor agreement. Indeed, the Union, during negotiations, specifically stated that it would make certain

[10] In fact, after Pomptonian's full compliance with the terms of the Settlement Agreement, the Regional Director did schedule an election for Pomptonian's employees to exercise their statutory rights under the Act. An election was scheduled for February 10, 2011, but was postponed after the Union's subsequent Request for Review. *See* Regional Director's January 25, 2011 Notice of Representation Hearing and his February 4, 2011 Order Postponing Hearing, attached collectively as Exhibit L.

concessions in bargaining if Pomptonian would agree to withdraw the Petition. Accordingly, it is clear that during all stages of this matter, the Union was not only aware of the pending Petition, but was cognizant that it would be processed and an election would be held.

Furthermore, the representations made by the Regional Director were wholly consistent with the procedures followed by the Board in situations exactly like those present here. As previously addressed, the Board's own Casehandling Manual and the Board's precedent demonstrate that where there is a blocking charge, a Petition will be held in abeyance, and upon the execution of a settlement agreement, the Petition will be processed. Casehandling Manual § 11733.2(a). *See also* Casehandling Manual §§ 11730-74 (where there is a blocking charge, a petition may be held in abeyance, processed, or dismissed, based upon the outcome of an investigation, hearing, or the settlement of alleged unfair labor practice charges). Therefore, even if the Union's contention that the Regional Director did not notify it that the Petition would be processed after Pomptonian's compliance with the Settlement Agreement was accurate, the Union was aware, or should have been aware if it exercised even reasonable diligence, that this was the correct and applicable procedural practice.

There can be no finding of detriment to the Union were the Board to follow its own established practices and procedures in the instant matter. To the contrary, the Regional Director's instant Order is in every respect detrimental to the rights of Pomptonian and Pomptonian's employees, as Pomptonian gave up its right to litigate the *alleged* unfair labor practice charges when it entered into the Settlement Agreement in reliance upon the Regional Director's representations that he would process the Petition, and Pomptonian's employees are being deprived their rights under the Act to determine through a voluntary election whether they wish to have the Union continue to represent them as their collective bargaining representative.

D. The Regional Director Failed to Consider Public Policy Considerations that Mandate the Dismissal of the Union's "Motion," the Processing of Pomptonian's Petition, and the Holding of an Election to Determine Whether Employees Wish to Continue to Be Represented by the Union

In issuing the instant Order, the Regional Director failed to take into account public policy considerations and the underlying intent of the Act when he dismissed the Petition. The Board's primary concern in regulating conduct attending organizational activities under the Act is "to protect the statutory rights of employees, . . . [while balancing] those rights against the rights of the employer and, to a lesser extent, those of the union." John E. Higgins, Jr. Ed., THE DEVELOPING LABOR LAW, 75 (5th Ed. 2006). By seeking to have the Petition processed Pomptonian is simply requesting that its employees be afforded that fundamental right and that they be afforded the opportunity to resolve the uncertainty over their wishes in a Board-conducted election.

As discussed, Pomptonian filed the Petition with the good-faith reasonable uncertainty required under *Levitz* and its progeny, and continued to proceed in good faith through all stages of this matter. There was no causal connection between the employees' submission of their untainted petitions to Pomptonian and any alleged unfair labor practices, as the prospective withdrawal occurred *after* the employees' submission of their petitions. Furthermore, any alleged "harm" would have been remedied by Pomptonian's compliance with the Settlement Agreement, including the negotiation and execution of a successor collective bargaining agreement. Accordingly, there should be no bar to giving Pomptonian's employees their deserved opportunity and statutory right to vote anonymously in a Board-conducted election.

Should an election demonstrate that the Union continues to receive the support of a majority of the employees in the Unit, the parties have already negotiated the terms and

conditions of employment for a successor collective bargaining agreement, and there has been no harm done. However, if the Union does not continue to have the support of a majority of the bargaining Unit's employees, then the Union's representation should not be forced upon the employees by the Board, and the contract should be null and void. *Levitz*, 333 NLRB at 227-28 n.52 (citing *cf. RCA del Caribe*, 262 NLRB 963 (1982)). Employees' rights should be tantamount in this proceeding, and any finding other than one allowing them to vote in a Board-conducted election would be an abuse by the Board.

V. CONCLUSION

As demonstrated above, the overwhelming record evidence demonstrates that the Petition should be processed under the Board's precedent and its published procedures. Pomptonian had the requisite good faith uncertainty to file the Petition, and subsequent alleged and unproven unfair labor practice charges had no causal nexus to the employees' showing of disaffection with the Union. Even assuming the unproven unfair labor practice charges could have potentially impacted an election, any such impact was undeniably cured by Pomptonian's subsequent execution of and compliance with the Settlement Agreement, including its restoration of recognition to the Union, and the negotiation and execution of a successor collective bargaining agreement with the Union. Additionally, the evidence demonstrates that Pomptonian relied to its detriment on the assurances made by the Regional Director that the Petition would be held in abeyance and processed following Pomptonian's compliance with the terms of the Settlement Agreement. The Regional Director's Order dismissing Pomptonian's Petition is incorrect on the law and contrary to the Board's procedures, and is not only injurious to Pomptonian's rights, but to Pomptonian's employees' rights to choose in an election whether they wish to continue to be represented by the Union.

Respectfully submitted,

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Attorneys for Pomptonian Food Service

Dated: November 8, 2011

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 8th day of November, 2011, I caused a true and correct copy of the foregoing Request for Review to be served via electronic mail to:

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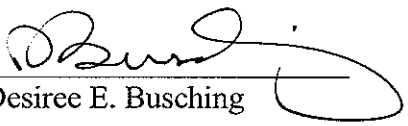

Desiree E. Busching